Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections of Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
	)	
Rate Regulation	)	

REPLY COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these Reply Comments on the Commission's Notice of Proposed Rulemaking in this proceeding, released December 24, 1992. USTA submitted Comments in this proceeding on January 27, 1992.

I. THE COMMISSION MUST DO WHAT CONGRESS TELLS IT TO DO.

The Commission faces a complex task in crafting a regulatory scheme to regulate cable rates. Certainly, the task required by the Congress is a formidable one. A 180 day deadline for action, at least initial action, demands a great commitment of time and resources.

The Commission's burden is eased by the directions provided by the Congress. It has already defined the framework of the regulatory scheme and made most of the key decisions. See, e.g., Comments of Consumer Federation of America (CFA) at 6-16; 76-83.

The Commission should accept those guidelines and fill in the details, as Congress expected of it. Indeed, the Congress has resolved a number of issues conclusively, beyond the power of the Commission to determine otherwise. See USTA Comments at 5-9. It would be a great waste of the Commission's resources to attempt now to find legislative loopholes through which it can redefine the statute.

Many commenters do not agree with the Commission's initial assessment of the requirements of the statute. A significant percentage of the commenters perceived the same infirmity that USTA perceived in the NPRM - an unwillingness on the part of the Commission to comply with its legislative mandate. The Consumer Federation of America, while the most comprehensive, is certainly not alone in this view. Comments of CFA at 1, 108-110.

The Commission is faced with many of the same pressures to reconcile regulation with competition here as it has faced elsewhere. As it has done elsewhere, the presence of regulation under the governing statute does not reject other policies designed to promote competition. See Minnesota Political Subdivisions Comments at 4. To the extent that the Commission deviates from the Congressionally-marked path for implementation, the Commission still should promote competitive entry here to foster consumer choice in the cable television business. Ultimately, of course, the most effective vehicle by which to foster competition in the core cable business is to remove today's barriers to entry, and to permit Title II carriers to be cable operators in their telephone service areas.

II. A MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR CANNOT BE USED IN THE EVALUATION OF WHETHER EFFECTIVE COMPETITION EXISTS UNLESS IT PROVIDES MULTIPLE CHANNELS THAT ARE COMPARABLE IN BOTH PROGRAMMING AND THE NUMBER OF PROGRAMMING OPTIONS.

Some commenters would have the Commission find effective competition where it is not present. A video dialtone network in place, but without a multichannel video programming distributor (MCVPD) on it, cannot provide effective competition to an entrenched cable operator. Likewise, a user of a video dialtone system can't provide effective competition to that cable operator if its range of programming is not a comparable multichannel product. USTA, then, disagrees with the New York Cable Commission on even a "presumption" standard. Comments of New York State Commission on Cable Television at 4. The presumption should be that the presence of a video dialtone network alone does not offer effective competition, at least for now.

In determining whether a cable system is subject to effective competition or not, the Commission's regulations should make it clear that effective competition exists only where an MCVPD offers programming that is comparable in both nature and quantity. See Comments of Armstrong Utilities at 4; National Association of Broadcasters (NAB) at 12.

The requirement of the statute is that programming be "comparable." 47 U.S.C. 623(l)(1)(B). See also 47 U.S.C. 623(c)(2)(A). It is not enough that the competing MCVPD or other entity provide programming that is limited at best, and only "complimentary to the cable operator's lineup." Comments of CFA at 114-116. The statutory requirement anticipates an offering that is comparable in programming and in the number of channels. Comments of Massachusetts Community Antenna Television

Commission at 17; Mayor, City of Somerville at 3. See also Comments of NAB at note 15.

Unless the offering of another MCVPD is competitive, in toto, with the offering of the cable operator, it cannot be counted in the assessment of effective competition. Comments of NATOA at 11-13; Wireless Cable Association at 13.

III. A CABLE OPERATOR MUST UNBUNDLE COSTS AND RECORD THEM IN SUCH A WAY THAT CUSTOMERS CAN PURCHASE CABLE EQUIPMENT AND INSTALLATION FROM ANYONE THEY WISH.

The comments reflect a concern that cable operators often engage in anticompetitive practices designed to "lock up" subscribers. To assure that subscribers will enter into contracts for service, many operators bundle installation, converter and even remote controller rental costs into the basic cable rate. In the related cable home wiring proceeding, the Commission has just concluded that "low or discounted installation charges (often well below cost) are charged to overcome initial sales resistance or to respond to changes in demand that are seasonally based; by contrast, higher fees are sometimes charged to discourage subscriber churn, or to speed up capital recovery."[1]

At least some of the situations described by the Commission appear to involve service pricing that is predatory in nature. All of the described pricing lacks cost justification. It is intended to serve ends that are unrelated to cost recovery. There cannot

[1]Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring, MM Docket No. 92-260, released February 2, 1993, at ¶ 18.

be proportionate recovery of joint and common costs, for example, as required by the new statute for the related services.

The Commission should assure that customers do not pay installation rates that are out of proportion to costs. Unbundling installation and equipment costs is an essential first step. The Commission should reject bundling that does not rely on accurate costing, and it should permit separate purchase. Contrast Comments of Time Warner at 59. A cable operator should not be allowed to offer its basic service tier only if a customer also agrees to pay the bundled costs for installation or equipment, or both, or if the customer must pay those costs in a bundled price without any option to say no.

A cable operator should be required to offer unbundled pricing. Only if the cable operator can show the relevant costs and unbundle them in pricing will the consumer be fully protected. Notwithstanding the rhetoric on benchmarking, the cable operators recognize that some degree of costing and cost allocation is essential here. This is a situation in which that cost allocation and the related unbundling is essential. See Comments of Cablevision Systems at 8-13; Continental Cable at 34, 36; Comcast at 27, n.29; Time Warner at 48, 58 and TCI at 38. See even Cox Cable at 23-24.

Only by, at minimum, unbundling can the Commission foster competition in the installation and equipment markets. In addition, cost separation will help to push the basic service tier and cable programming service rates to their appropriate cost, sending correct economic signals and perhaps inviting additional competition, even in the core cable business.

Unbundling, and cost and price separation, also are necessary to reconcile the action in this proceeding with other requirements of the new legislation. The Commission has a separate obligation under new section 624A of the Act to publish a report on ways to promote the compatibility of cable consumer equipment with cable services, within one year, and then to issue regulations to achieve that compatibility within another 180 days. 47 U.S.C. 624A (b) and (c).

Action here is needed to help prepare the groundwork for the long term consumer equipment compatibility regulations. Only by separating basic service from installation and equipment provision can the Commission achieve success in promoting both competition and compatibility with cable installation and consumer equipment, as section 624A requires.

IV. THE COMMISSION HAS THE AUTHORITY AND RESPONSIBILITY TO ENGAGE IN RATE REGULATION WHEN EFFECTIVE COMPETITION IS ABSENT AND A FRANCHISING ENTITY IS UNABLE OR UNWILLING TO PERFORM THE STATUTORY REQUIREMENTS.

One issue that is contested in the comments is whether the Commission has the authority under the statute to take rate regulatory action when a franchising entity does not. Comments of CFA at 122-124. Compare Comments of CATA at 8; Cablevision Industries at 58-59. Assuming that effective competition is absent, any cable system (that is not afforded small system relief under 47 U.S.C. 623(i)) is subject to Commission action under the statute.

The power to engage in rate regulation is found in sections 612 and 623 of the 1992 statute. A clear grant of authority is provided to the Commission in section 623(a)(2):

"... If the Commission finds that a cable system is not subject to effective competition -

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b); and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c). (Emphasis added.)

This provision gives the Commission express authority to take action to ensure that rates for the basic service tier are reasonable under section 623(b) when the Commission disapproves a franchising authority's certification or revokes jurisdiction under section 623(a)(5) because the franchising authority does not do what it certifies it will do.[2]

That is not the end of the Commission's authority. The Commission has been given explicit independent authority in section 623(a)(5) and 623(a)(6) as well. Further, a number of commenters believe that the general scope of the new statute anticipates that the Commission should have this power, power that may be able to be utilized under section 4(i) and 4(j) of the Act.

In addressing this issue, the Commission should take pains to avoid the inclusion in its rules of practical procedural obstacles. Such obstacles will delay or thwart the achievement of its specifically-defined "obligation to subscribers." 47 U.S.C. 623(b)(1).

[2]The franchising authority's certification includes a promise that it will ensure compliance with section 623(b).

V. THE COMMISSION HAS THE AUTHORITY TO SET RATES THAT ARE BOTH COMPETITIVE AND REASONABLE RATES.

A number of cable commenters argue in their comments that the statute contemplates that cable operators can have "two bites" at the apple. NCTA, for example, seeks to benchmark rates at the "competitive" level, but also submits that cable operators should be able to increase rates beyond that point - to include individually-identified or other costs to the point where rates clearly become unreasonable. Comments of NCTA at 15-16, 30-39 and attachment. See also CATA at 17. NCTA and the other cable operators suggest that rates that are "competitive" (and presumably, without monopoly rents) can be overridden, and nevertheless raised, if they can institutionalize a Commission policy that a "reasonable" rate is both different and higher than a competitive one. To achieve this, they suggest that the "competitive" rate is always arbitrarily low - the rate that would prevail in a (rare and temporary) heated, head-to-head fight, such as the pricing faced by the cable subsidiary of FPL Group in the 1980s. See Comments of NCTA at 18. This picture promotes false alternatives. The correct alternative is to remove monopoly rents.

The two tests must either be identical or the competitive test must be viewed as the preeminent test, given the statutory scheme. USTA's Comments addressed reasonable rates, but did not divorce that standard from the requirement that monopoly rents be extracted. The goal of the statute is to protect subscribers from rates "that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." 47 U.S.C. 623(b)(1). The regulations of the Commission must "carry out its obligations under paragraph (1)." 47 U.S.C. 623(b)(2).

A rate that is not a competitive rate should be viewed as unreasonable. It is not anticipated in the statute that the regulations should protect subscribers from non-competitive rates, yet allow higher than competitive rates under a more complicated conceptual framework that somehow leaves a range of acceptable charges that lie somewhere between "competitive" rates and "reasonable" rates.

A number of municipalities argue that there is a different structure than what NCTA and the larger cable operators espouse. Comments of NATOA at 39-40. See also comments of Local Rate Coalition at 3-9. See also comments of New York State Consumer Protection Board at 8; CFA at 84.

Congress instructed the Commission to remove monopoly rents. Comments of the Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas at 2. The Commission should not tolerate rates that are in excess of the statutory standard. It should not permit a use of the term "reasonable" that allows rates to evade the requirements of section 623(b)(1).

VI. SMALL SYSTEMS MERIT RATE REGULATION, ACCOUNTING, DATA COLLECTION AND OTHER RELIEF.

While USTA recognizes the expectation of Congress that the Commission take affirmative action on rate regulation rules, USTA has advocated relief for its "rural area" cable operators, just as Congress also expressly permits.

Small system exemptions were supported by many commenters. See, e.g., Adelphia Cable, et.al., at 110; Nashoba Communications L.P. at 109; Consortium of Small Cable System Operators at 4; Satellite Dealers Association at 3; Coalition of Small System Operators at 3-9. See also Comments of CATA at 35; NCTA at 83 and NTCA at 4-6. Northland explained that regulation of small systems by the Commission was not cost-effective. Comments of Northland Communications Corp. at 11-12; Ad Hoc Rural Consortium at 2.

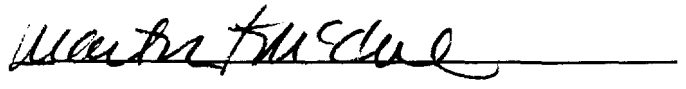
The small system suggestions made by USTA in its comments would address the issues of leverage and superior bargaining power by MSOs, while preserving rate regulation relief for small systems. It provides the best method to deal with small system issues. See USTA Comments at 15-17. See also Comments of CATA at 35 and NATOA at 88-89

VI. CONCLUSION.

The Commission should take action consistent with the USTA Comments and these Reply Comments.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY: 

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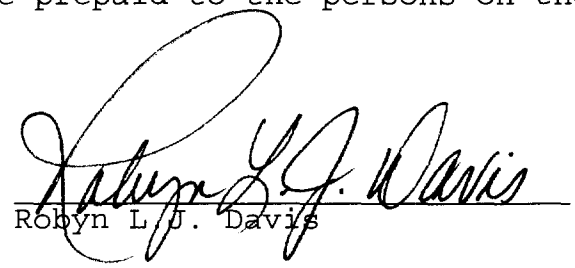
February 11, 1993

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on February 11, 1993 copies of the foregoing Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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